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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 64

JOSE M. RIVERA,

Appellant.

20 Eagle Street
Albany, New York
September 13, 2023

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE WILSON: Next case on the calendar is
2 Number 64, People v. Jose Rivera.

3 (Pause)

4 MR. TALIA: Good afternoon, Your Honors. May it
5 please the court. Guy Talia from Monroe County Public
6 Defender's Office on behalf of appellant, Jose Rivera. I
7 would like to reserve three minutes for rebuttal, if I may,
8 Your Honor?

9 CHIEF JUDGE WILSON: I'm sorry. Did you say two
10 or three?

11 MR. TALIA: Three minutes, Your Honor.

12 CHIEF JUDGE WILSON: Great. Yes.

13 MR. TALIA: Thank you. The primary relief we're
14 seeking on this appeal is remittal to the sentencing court
15 to properly consider the existence of mitigating
16 circumstances in the commission of the offense.

17 JUDGE TROUTMAN: With respect to youthful
18 offender adjudications, doesn't the defense have the
19 obligation to bring to the attention of the court that
20 which they want the court to consider as a mitigating
21 circumstance in the first instance?

22 MR. TALIA: Yes, I would say they - - - I would
23 say that's correct at the - - - the trial version - - -

24 JUDGE TROUTMAN: And was that done here?

25 MR. TALIA: The - - - the trial attorney did not



1 ask the court to consider self-defense in particular for -
2 - - as a - - - as a mitigating circumstance. It did note
3 that the standard that - - - for eligibility and - - - and
4 then moved - - - implicitly saying that he should consider
5 eligibility, and then moved onto the factors for YO
6 consideration. But the trial attorney here did not
7 specifically ask the - - - the sentencing court to consider
8 what we're asking should be done if self-defense is a
9 mitigating factor. That's - - - that's true, Your Honor.

10 JUDGE TROUTMAN: So you concede it's not
11 preserved?

12 MR. TALIA: That - - - that issue is not
13 preserved. I think it does fall into the category of - - -
14 it didn't arise until Bruen came about. Traditionally, one
15 would not think of the display of a weapon and loading a
16 round into the chamber as a mitigating circumstance. But
17 after Bruen, I think it's clear that - - -

18 JUDGE TROUTMAN: But with respect to youthful
19 offender adjudications, it's a special category. And the
20 courts do have the ability to consider the manner in which
21 the weapon was being used, regardless of Bruen's existence,
22 for the adjudication of youthful offender status.

23 MR. TALIA: Yes, they do. The court in this
24 instance - - - and I think an issue of law is presented - -
25 - because the court in this instance did not exercise its

1 discretion to consider mitigating circumstances at all.

2 And - - -

3 JUDGE TROUTMAN: Is that because it didn't
4 specifically say what it did or did not accept?

5 MR. TALIA: Well, I think it's a little bit more
6 than - - - it didn't specifically say. He actually went
7 further - - - the - - - the trial court actually went
8 further and conflated, first of all, the factors to be
9 considered. It found that, you know, the factors are, if
10 you're not the sole participant, was your participation
11 minimal? He said - - - he said, no, I don't find the
12 participation minimal even though there was another
13 participant. And then he kind of just concluded,
14 therefore, there's no mitigating circumstance.

15 And then the second conflation he made was that
16 the circumstances to consider for eligibility versus the
17 mitigating circumstances with respect to YO adjudication,
18 he said, I find no mitigating circumstances that would
19 require me to find YO adjudication. But he - - - he didn't
20 - - - he didn't make the determination on mitigating
21 circumstances - - -

22 JUDGE SINGAS: I mean - - -

23 MR. TALIA: - - - with regard to self-defense.

24 JUDGE SINGAS: - - - I might agree with you that
25 the trial court was inarticulate and perhaps considered

1 some things before others. But I think the record is
2 pretty clear that he did consider mitigating circumstances,
3 that the totality of it is that there was a discussion
4 there. It wasn't just the fact that it was an armed
5 felony. I'd agree that it was an inarticulate way to
6 approach it. But I think he hit the factors that he needed
7 to hit to make the assessment. Am I wrong about that? And
8 especially when he referenced the presentencing report? Do
9 I have that wrong?

10 MR. TALIA: We - - - we disagree that the record
11 reflects that he properly considered mitigating
12 circumstances. Again, he - - - he - - - he said that he
13 reviewed certain things. He didn't have an updated PSI.
14 And then he - - - he said that there were mitigating
15 circumstances. There's no mitigating circumstances
16 requiring YO adjudication. That's a whole different set of
17 circumstances that could apply to that, which he couldn't
18 have considered because he didn't get an updated PSI. I
19 think Rudolph required him to get updated PSI to consider
20 YO adjudication. So he - - - he didn't make the - - - the
21 correct analysis.

22 And then later, when he did try to consider
23 mitigating circumstances, as you pointed out, he said, oh,
24 and by the way, they're - - - he double-counted. He said,
25 there's - - - there could be no mitigating circumstances

1 here because it was an armed felony. Well, of course - - -

2 JUDGE SINGAS: Well, I think he said exactly that
3 as such, there are aggravating factors, as opposed to
4 mitigating factors, in light of defendant's participation.
5 So that reference to defendant's participation is not
6 reasoning only because it's an armed felon.

7 So I - - - I think there was consideration. Like
8 I said, I think it might've been inarticulate, but I don't
9 think we can say there was no consideration.

10 MR. TALIA: Again, Your Honor, I think we
11 disagree, just based upon the fact - - - I mean, you
12 mentioned that participation. Again, you - - - there's two
13 separate factors. Is your participation minimal? If he
14 finds that it - - - if it's not minimal, he can't just
15 necessarily then conclude there's no mitigating
16 circumstances. He has to also look at, okay, your
17 participation wasn't minimal. But are there also
18 mitigating circumstances in the commission of this offense
19 that could've als - - - it's two-pronged inquiry. So
20 that's a - - -

21 JUDGE SINGAS: Right. And what if the Appellate
22 Division applied the correct analysis? Is that okay?

23 MR. TALIA: No, it's not. And the Appellate
24 Division in this case actually did attempt to apply the
25 correct analysis. I think they recognized that he - - - it

1 hadn't been done below. But that is not okay because the -
2 - - the client, my client, is entitled to a determination.
3 And then he's entitled to a reviewable determination. So
4 he - - - the Appellate Division - - -

5 JUDGE TROUTMAN: But can't the Appellate
6 Division, as it was done in Z.H., in the Fourth Department,
7 make that determination itself that YO should apply? Even
8 when the court below did not?

9 MR. TALIA: Well, Your Honor, I think - - - I
10 think that deprives my client of his right to appeal as a
11 right. He has to - - - he has to have at least one - - -
12 one review of the decision. And maybe they can do it in
13 favor - - -

14 JUDGE TROUTMAN: But you do agree that the
15 Appellate Division does have interest of justice
16 jurisdiction to allow it on its own to review the record
17 and decide to grant?

18 MR. TALIA: I think - - - I think granting is
19 different than denying - - - denial. Because if they
20 grant, then the - - - the issue about my client's appeal on
21 his right is - - - is moot, because they - - - they
22 would've granted it. So I think it is a distinction - - -

23 JUDGE TROUTMAN: If there's a record establishing
24 what the mitigating factors are, that the defense put
25 forth, which they could have, the manner in which the gun

1 was being utilized or not. That could have been put before
2 the court.

3 MR. TALIA: It could have, it could have. Sure,
4 Your Honor. I - - - I think if there's a concern there - -
5 - I think if there's a concern about that issue being
6 raised, this court, you know, obviously can find that - - -
7 that the trial court did not properly consider. It can
8 also determine that self-defense should be a mitigating - -
9 - considered as a mitigating circumstances and then - - -
10 and then remit it to the trial court, and maybe hold a
11 hearing on, you know, whether actual - - - you know, there
12 was self-defense, and then - - -

13 CHIEF JUDGE WILSON: So - - - so to the extent
14 that - - - that Bruen has any application here, you'd have
15 to conclude that minors have a Second Amendment right.

16 MR. TALIA: That is - - -

17 CHIEF JUDGE WILSON: What is - - - what do we
18 know about that?

19 MR. TALIA: That is not exactly correct, Your
20 Honor.

21 CHIEF JUDGE WILSON: Okay.

22 MR. TALIA: So my client's age is irrelevant for
23 different reasons, depending on the argument that it's
24 applied to. It's irrelevant in terms of considering
25 mitigating circumstances. Because obviously, whether a

1 weapon is used in self-defense is not age-contingent. You
2 know, someone could use a weapon in self-defense regardless
3 of what age they are.

4 Furthermore, in considering mitigating
5 circumstances, we're talking about youthful offender
6 adjudication. The whole purpose of that is to recognize
7 that age is - - - in itself is a mitigating factor. And to
8 use it against him in that context would just be contrary
9 to - - -

10 CHIEF JUDGE WILSON: Well, that's fine. But what
11 - - - what does Bruen have to do with anything you just
12 said?

13 MR. TALIA: Bruen applies minimally to our first
14 argument. Bruen is much more important in our alternative
15 argument, which seeks remittal, remittal to the trial
16 court, with the - - - the presumptive ineligibility
17 completely removed from the picture, based upon the
18 unconstitutional - - -

19 CHIEF JUDGE WILSON: But that's my question,
20 then. Is it presumptively lawful for a five-year old to
21 own a handgun under the Second Amendment?

22 MR. TALIA: I don't - - - I don't want to get
23 into drawing lines. I would guess probably not
24 presumptively offered for a five-year-old. I mean,
25 seventeen is close to the range, particularly after Bruen.

1 A lot of courts have nullified eighteen-, twenty-year-old
2 prohibitions, or - - -

3 JUDGE CANNATARO: I'm sorry, so - - -

4 MR. TALIA: - - - several courts have have done
5 that.

6 JUDGE CANNATARO: - - - can you just clarify - -
7 - maybe I'm missing what it - - - what would be the
8 rationale for removing the presumptive ineligibility, in
9 this case, that he's old enough?

10 MR. TALIA: No. No. The - - - the basis for
11 removing the presumptive eligibility is because it - - - it
12 amounts to an impermissible restriction on the newly
13 articulated right to carry a firearm outside your home.

14 JUDGE CANNATARO: So you would challenge the
15 constitutionality of the age restriction as well?

16 MR. TALIA: I don't think I need to challenge the
17 constitutionality of the - - - the age restriction, Your
18 Honor. Because his age comes into factor for - - - for two
19 reasons in the - - - in the constitutional misclassific - -
20 - misclassification argument. One is whether he has
21 standing. And - - - because you could say, well, he was
22 ineligible because he was seventeen. What difference does
23 it make whether the statute differentiates between
24 eligibility or noncompliance?

25 But he clearly had - - - he clearly has standing,

1 as the Chief Judge said earlier. The standing amounts to
2 an injury. And what he got was a lifetime ban on
3 exercising his Second Amendment right. So he's - - - his
4 Second Amendment right has clearly been impacted by the
5 classification. Because it goes on forever, his whole
6 life.

7 The other context, his age comes up in the
8 constitutional argument - - - why it's irrelevant is
9 because it's a facial challenge. So it doesn't matter
10 whether he was eligible or ineligible for a license. The
11 classification of the statute in all instances is a violent
12 C felony - - - is a facial problem. Because there's no
13 circumstances where it would be proper to classify someone
14 as a violent felon for any unlicensed possession. That - -
15 - and that kind of ba - - - I have to backtrack a little
16 bit to explain that in full. So - - -

17 JUDGE CANNATARO: But does that have anything to
18 do with Bruen necessarily?

19 MR. TALIA: Yes. Bruen - - - prior to Bruen, the
20 state was fairly free to regulate public possession. It
21 could - - - it can, you know, restrict it with regulations,
22 with licensing. Because there was no extension of the
23 constitutional right, fundamental right to do that before
24 Bruen. And Bruen also said that now you have this general
25 right that's subject to very restricted limitations.

1 So it does allow licensing. We - - - we - - - we
2 acknowledge that. But there's - - - there's basically two
3 reasons you can be unlicensed: one, because you're
4 ineligible; or two, because you didn't comply with the
5 statute. You're eligible, and you just didn't go and seek
6 a license.

7 And right now, New York penalizes either of those
8 circumstances as a - - - as a violent felony. And under
9 Bruen, the purpose of licensing under Bruen is to ensure
10 that those who are disqualified from exercising their right
11 are not carrying. It's not - - - doesn't contemplate
12 licensing as creating a whole new class of people who are
13 now permanently disqualified from exercising their Second
14 Amendment right, i.e., unlicensed people.

15 So to treat someone who is just merely
16 noncompliant with the law and permanently disqualifying
17 them from ever exercising their Second Amendment right, is
18 unconstitutional under Bruen because it amounts to an
19 impermissible restriction - - -

20 JUDGE RIVERA: But - - -

21 MR. TALIA: - - - on the right.

22 JUDGE RIVERA: - - - I'm - - - may have
23 misunderstood what you're saying here at the end. Bruen is
24 striking down a part of a licensing scheme, part of New
25 York's licensing scheme, not the entire licensing scheme.

1 So it's - - -

2 MR. TALIA: Yes.

3 JUDGE RIVERA: - - - recognizing that New York
4 and other jurisdictions can regulate, can have a licensing
5 scheme. So I'm sorry, I'm not understanding this last part
6 of your argument.

7 MR. TALIA: Sure. Sure. No problem.

8 Our argument does not hinge on striking down the
9 proper cause requirement.

10 JUDGE RIVERA: Okay.

11 MR. TALIA: It's not - - - our argument is based
12 upon the foundational holdings of Bruen to get to striking
13 down the proper cause requirement.

14 JUDGE RIVERA: Um-hum.

15 MR. TALIA: Number one, extending Second
16 Amendment protections to outside-the-home possession; and
17 number two, saying that you can't place restrictions on
18 that right, that new and articulated right, unless it
19 comports with the nation's tradition of firearm regulation.

20 So what it boils down to is there's no tradition
21 in our firearm regulations saying that noncompliance with a
22 licensing thing permanently disqualifies you from ever
23 exercising your Second Amendment right again. And - - -

24 JUDGE TROUTMAN: Is there a history of regulating
25 underage people? Like the Chief Judge referred earlier, a

1 five-year-old? So you're saying the state can't say that
 2 age is a consideration as to whether they are capable of
 3 exercising that right in a manner that is not dangerous?
 4 You're saying Bruen took all of that away? And anybody at
 5 any time, no matter who you are, whatever age you are, you
 6 can have a gun?

7 MR. TALIA: No. Nope. We don't - - - that's not
 8 what we're saying, and we don't think that - - - we don't
 9 think that that's what Bruen said. Like - - - again, his -
 10 - -

11 JUDGE TROUTMAN: So clearly, what are you saying?

12 MR. TALIA: So again, it's a - - - we're saying
 13 that to - - - to classify as a violent felony, all
 14 unlicensed possession, whether it results from
 15 noncompliance or because you're ineligible, is an
 16 impermissible restriction because it permanently
 17 disqualifies - - -

18 JUDGE TROUTMAN: So the statutory classification
 19 in the manner that it does is what - - - is what you're
 20 contesting?

21 MR. TALIA: Yes, I think - - -

22 JUDGE RIVERA: Or your - - -

23 MR. TALIA: - - - that's correct, Your Honor.

24 JUDGE RIVERA: - - - if I - - - if I'm
 25 understanding this last piece, what you're really

1 contesting is you can't impose a lifetime ban?

2 MR. TALIA: Right. You can't impose a lifetime
3 ban for - - - for noncompliance. In fact, New York already
4 - - - already has a statute that - - - that punishes
5 noncompliance. It's in the licensing law. It's
6 400.00 (15). And it says that noncompliance with this - -
7 - with this licensing regime is an A misdemeanor.

8 JUDGE RIVERA: Is that because at some point it
9 assumes you're going to seek a license?

10 MR. TALIA: Well, I think - - - I think it just -
11 - - that's put in place. Because without that, you know, a
12 licensing regime is more a suggestion, right? You have to
13 have some - - - some manner of punishing a failure to
14 comply with a licensing scheme. But - - -

15 CHIEF JUDGE WILSON: Do you know of cases where
16 somebody who was possessing an un - - - sorry, an un - - -
17 let me try this way. Do you know of cases in which
18 somebody who had a license to possess a gun, let's say, in
19 the home, was found with a gun on the street, and was
20 prosecuted under 400.00(15)?

21 MR. TALIA: No, Your Honor, we're not aware of -
22 - - I'm not aware of any prosecutions under 400.00(15).

23 CHIEF JUDGE WILSON: At all?

24 MR. TALIA: In my experience, no.

25 CHIEF JUDGE WILSON: Okay. That's - - - I didn't

1 find any, either.

2 MR. TALIA: Right.

3 CHIEF JUDGE WILSON: Okay.

4 MR. TALIA: Which they're all - - - which is,
5 they're all prosecuted on a 265.03(3), and that's - - - and
6 that's - - -

7 CHIEF JUDGE WILSON: And so 400.00(15) is very,
8 very brief. And it really just says, any violation of any
9 provision of 400.00 is a - - - a misdemeanor. And 400.00
10 includes things like the police will conduct a thorough
11 check, and they have deadlines. I mean, it can't possibly
12 be that everything in there is an A misdemeanor if you
13 don't do it, because everybody who's involved in any kind
14 of gun licensing is guilty of an A misdemeanor.

15 MR. TALIA: It is very broad, Your Honor. It
16 just - - - just talks - - - talks about noncompliance. And
17 - - -

18 CHIEF JUDGE WILSON: But you found nothing?

19 MR. TALIA: We found nothing on that, yes.
20 That's correct, Your Honor.

21 So that - - - that's how Bruen comes into play.
22 So we have the first argument, consider mitigating
23 circumstances, remit to consider whether self-defense
24 should be a mitigating circumstance, which my client would
25 then be eligible for YO consideration. The alternative

1 argument is that the classification of all unlicensed
2 possession of C violent felony is unconstitutional, and
3 therefore, should be remitted to - - - to have my client
4 considered eligible for YO consideration to be considered
5 there.

6 I see my time has expired. I don't know if the
7 court wants to get into preservation issues or anything
8 like that. Or otherwise, I'll - - -

9 CHIEF JUDGE WILSON: Thank you. You get two-
10 minute rebuttal - - -

11 MR. TALIA: - - - reserve my time.

12 CHIEF JUDGE WILSON: - - - if you need to. Thank
13 you.

14 MR. TALIA: Thank you, Your Honors.

15 MS. GRAY: May it please the court. Good
16 afternoon, Your Honors. Lisa Gray on behalf of the People.

17 With respect to appellant's request for remittal
18 to consider self-defense, in terms of the youthful offender
19 adjudication, whether or not that it created a mitigating
20 circumstance, the People would certainly oppose remittal.
21 Judge Singas, to your point, you know, the sentencing court
22 could've been a little bit more articulate. But - - - but
23 the record is clear that, you know, sentencing court took
24 into consideration its obligation, what factors it needed
25 to consider, and it laid out everything that it did

1 consider when it came to deciding whether or not Mr. Rivera
2 could overcome this presumptive ineligibility in order to
3 even get to the question of youthful offender adjudication.

4 The sentencing court said, listen, I - - - I
5 looked at the - - - at the plea minutes. I - - - I - - - I
6 don't know that the court said necessarily plea minutes,
7 but the court said, I looked at the entire record. I
8 looked at all the prior proceedings. And in the - - - in
9 the plea minutes, Mr. Rivera did raise an issue about, you
10 know, the reason why he had - - - why he had that loaded
11 gun.

12 So you know, even - - - the court was certainly
13 aware of the circumstances surrounding possession of this -
14 - - of this loaded firearm. The court noted that, you
15 know, that it was Mr. Rivera - - -

16 JUDGE TROUTMAN: Whose responsibility or burden
17 is it to put mitigating circumstances before the court?

18 MS. GRAY: It was certainly Mr. Rivera's
19 responsibility to do that. And - - - and he did not. But
20 the court - - - even that failure to deter - - -

21 JUDGE TROUTMAN: The court looked at it and threw
22 it away?

23 MS. GRAY: - - - the court. Yup, the court went
24 through - - - went through its analysis. And - - - and I
25 just want to note that in this - - - for this particular

1 sentencing court, he actually makes reference to a previous
2 case that had been returned by the Appellate Division. So
3 this particular court was - - - was acutely aware that he -
4 - - that it had actually made a mistake earlier with this
5 exact same issue and was - - - and again, to your point,
6 Judge Singas, was very much aware that the court wanted to
7 do it properly a second time. And it - - - and it did so
8 based on all of the factors that - - - you know, the
9 defendant admitted he was not the sole participant. He
10 admitted that he illegally possessed it. It was a stolen
11 firearm. And none of those factors militated against - - -
12 or militated in favor of overcoming that presumptive
13 ineligibility in order to even get to the question of
14 youthful offender adjudication.

15 CHIEF JUDGE WILSON: So some part of his
16 argument, of Mr. Rivera's argument, I thought, was that,
17 essentially, the court might've looked on my eligibility
18 differently if it had read Bruen, which it couldn't have
19 read at the time. Because I have a - - - and put aside for
20 a moment the fact that he's seventeen - - - I have a
21 constitutional right that the court wouldn't recognize, and
22 that's a mitigating factor of a sort. What do you say to
23 that?

24 MS. GRAY: I think that this court needs to
25 reject that. And I'll tell you why. Because I think it's

1 really important for this court to remember what question
2 the Supreme Court actually did answer. They were asked - -
3 - they were asked to answer a broader question. And the
4 Supreme Court said, no, we're going to narrow this, and
5 we're going to only address this proper cause requirement,
6 whether or not ordinary law-abiding citizens have to show
7 some additional reason for self-protection purposes in
8 order to get this public carry permit. They were asked a
9 broader question; they narrowed it. And by doing that,
10 that did not create any sort of sea change in the way that
11 New York has the ability to enforce unlicensed gun
12 possession.

13 Now, going to Mr. Rivera's argument, that, you
14 know, at - - - at seventeen, barely seventeen - - - he had
15 just turned seventeen four months before this incident had
16 occurred - - - he would not have been eligible for a pistol
17 permit. He had no - - - he - - - he didn't preserve the
18 argument. He - - - he has no standing.

19 And the decision in Bruen, again, addressed only
20 a very narrow issue. And it doesn't apply to the criminal
21 possession of a - - - of a weapon statutes here in New
22 York. And it's certainly - - - you know, Mr. Rivera can -
23 - - can avail himself of the holding in Bruen.

24 I mean, getting - - - getting - - - getting to
25 preservation and - - - and - - - and obviously this court

1 discussed this at length for - - - for the previous case -
2 - - but even - - - even if, you know, Mr. Rivera could have
3 raised this, certainly - - - he didn't raise it at the
4 trial level. He could've raised it at the appellate level.
5 And he - - - his leave application to this particular court
6 was pending while - - - when the Bruen app - - - when the
7 Bruen decision came out. And it wasn't until this court
8 affirmatively sought the parties' opinion and input on
9 whether or not Bruen applied to this case.

10 So again, even aft - - - while his - - - while
11 his leave to this court was pending, he did not seek to
12 amend or supplement his leave application in order to
13 incorporate any of these Bruen arguments. They're
14 certainly not preserved.

15 With respect to, you know, standing, again, Mr. -
16 - - Mr. Rivera was seventeen. He was not even eligible for
17 a pistol permit. And to the extent - - - and I - - - to
18 the extent he's even raising a claim as to the age
19 restrictions on licensing statutes in - - - statutes in New
20 York, which - - - which he's not - - - you know - - -

21 JUDGE RIVERA: Well, he does say the conviction
22 results, right - - -

23 MS. GRAY: He - - - he does.

24 JUDGE RIVERA: - - - the conviction results in
25 this ban. And that violate - - - that's a violation of

1 Second Amendment rights. That's - - - that's what he's
2 saying?

3 MS. GRAY: He - - - he is say - - - he - - - yes,
4 he does say that.

5 JUDGE RIVERA: What's - - - what's your response
6 to that?

7 MS. GRAY: But my - - - my respon - - - my
8 response to that is, Bruen only dealt with a very narrow
9 issue that applied to the licensing scheme as set forth in
10 400. And it left intact all of the criminal possession of
11 a weapon statutes here in New York and New York State's
12 ability to legislate the - - - the punishment and the
13 sentencing as it relates to the convictions.

14 So Bruen is separate - - - the holding in Bruen
15 is separate apart and does not apply to the sentencing
16 challenges that Mr. Rivera is raising.

17 JUDGE RIVERA: Would that include a defendant
18 who, it was obvious from the record - - - I'm not talking
19 about this defendant, hypothetically. The defendant was
20 obvious from the record - - - the only reason he would not
21 have gotten that license is because of the probable cause
22 requirement?

23 MS. GRAY: Just repeat that one more time, Judge?
24 I - - -

25 JUDGE RIVERA: Would your position be the same if

1 it's a defendant for whom it is obvious from the record
2 that the only reason that they would not have gotten a
3 license is because of the probable cause requirement?

4 MS. GRAY: New York still retains the right to
5 enforce the unlicensed possession of a weapon outside the
6 home or place of business. And - - -

7 JUDGE RIVERA: Yes, as long as the licensing
8 provisions, as I understand Bruen - - - as long as any of
9 those licensing provisions and requirements do not go afoul
10 of the Second Amendment.

11 MS. GRAY: That individual still has to submit
12 themselves to the licensing regime. They still have to apply
13 for a license. And they cannot be denied a license,
14 obviously, by showing some additional need for self-
15 protection over and above just ordinary - - - needs
16 ordinary self-protection.

17 CHIEF JUDGE WILSON: So your position is, if the
18 license - - - if everything in a licensing scheme was
19 unconstitutional, every - - - every element of it violated
20 either the Second Amendment or some other constitutional
21 guarantee, somebody would still have to apply for a license
22 and get rejected to be able to defend a prosecution?

23 MS. GRAY: Well, I think - - - I think in order
24 to attack the constitutionality of the statute, it has to
25 be - - - it must be, on its face, unconstitutional across -



1 - - across the board in every - - - in every manner. And
2 in - - - in the CPW statute, it's unlawful - - - excuse me
3 - - - it's unlawful possession of a firearm outside your
4 home or place of business.

5 And so there are many reasons why someone might
6 not have a pistol permit in order to possess that license
7 outside their home or place of business. They could be a
8 previous felon. There are other protec - - - there are
9 other classes that Bruen sort of carves out and uses as an
10 example of why licensing schemes are still necessary and -
11 - - and are in effect across all different states.

12 So - - - so the criminal - - - the criminal
13 statutes are not - - - are not unconstitutional as they
14 relate to Bruen because there are other reasons why
15 somebody might not - - - might still be prosecuted because
16 they are constitutionally barred from having - - - having a
17 license.

18 And in this case, Mr. Rivera is not making any
19 sort of claim that the age restriction in 400 is
20 unconstitutional. He was seventeen at the time. He
21 possessed that loaded, stolen firearm. He - - - Bruen does
22 not apply to the - - - his conviction, his sentencing. All
23 of those things still remain intact, even in light of the
24 decision in Bruen.

25 At this - - - it's the People's position that



1 certainly remittal is not required for the judge to
2 consider self-protection as put forth by Mr. - - - by Mr.
3 Rivera in light of Bruen. And for those reasons, the - - -
4 the People would ask that this court deny Mr. Rivera's
5 request for remittal for any reason.

6 CHIEF JUDGE WILSON: Let me just ask you one more
7 thing.

8 MS. GRAY: Sure.

9 CHIEF JUDGE WILSON: Are you aware of any
10 prosecutions under 400.00 (15)?

11 MS. GRAY: I'm sorry, Your Honor. Yes, I did
12 mention - - - I - - - I meant to acknowledge that question.

13 I don't. I'm not aware of any, Your Honor. But
14 what - - - and I also can tell you that I'm not aware of
15 any cases in which somebody has been prosecuted under CPW
16 to having had a - - - a pistol permit. But I - - - but I
17 am not aware of anyone being prosecuted under Penal Law
18 400.00 (15).

19 CHIEF JUDGE WILSON: I'm sorry. And you - - -
20 when you say a pistol permit you mean a pistol permit that
21 has a restriction in it - - -

22 MS. GRAY: That - - -

23 CHIEF JUDGE WILSON: - - - where they're - - -
24 where they're - - - where they're in violation of the
25 restriction?

1 MS. GRAY: Correct, yes.

2 CHIEF JUDGE WILSON: You're not aware of any
3 prosecutions of that sort?

4 MS. GRAY: Right, yes.

5 CHIEF JUDGE WILSON: Okay. Thank you.

6 MS. GRAY: Thank you.

7 MS. CIEPRISZ: Good afternoon.

8 CHIEF JUDGE WILSON: Good afternoon.

9 MS. CIEPRISZ: May it please the court. Margaret
10 Cieprisz on behalf of the Attorney General, who's
11 intervening in this matter.

12 This case, as has already been discussed by ADA
13 Gray, does not present a question of law, because defendant
14 admittedly did not preserve this claim in the trial court.
15 Just want to add to - - - a couple of points to what ADA
16 Gray had said - - - said then.

17 With respect to the argument that there were no
18 grounds to raise this prior to - - - to Bruen, I just want
19 to point out in People v. Hughes, which has already been
20 discussed, in 2013, this court said that it was an open
21 question regarding whether or not the Second Amendment
22 limits penalties for unlawful gun possession. So - - - so
23 it was an open question. And - - - and this defendant
24 certainly could've raised this in 2017 when he was
25 resentenced.



1 In addition, Bruen extending the - - - the - - -
2 the right, the Second Amendment right to public carry
3 outside of the home did - - - did not come out of nowhere.
4 There were certainly indications in the Supreme Court's
5 language in Heller that - - - although in that particular
6 case, it only involved in-the-home possession, that the
7 court was discussing both keeping and bearing arms as being
8 - - - being protected within the Second Amendment. So it
9 was - - - it was not something that you needed to be a
10 soothsayer in order to know that this is where this was
11 going to be heading.

12 CHIEF JUDGE WILSON: Does Mr. Rivera have a
13 Second Amendment right at all?

14 MS. CIEPRISZ: He does not have a Second
15 Amendment right, Your Honor, in - - - Mr. Rivera had no - -
16 - he was not engaged in any constitutionally protected
17 conduct. He was - - - had no right to carry a license. He
18 wouldn't have been eligible for four years to carry that
19 license, something that he, again, does not challenge here.
20 And he was engaged in conduct that is not protected by the
21 Second - - -

22 CHIEF JUDGE WILSON: I didn't really mean - - -
23 right, I didn't really mean statutorily; I meant
24 constitutionally. Does a seventeen-year-old have a Second
25 Amendment right?

1 MS. CIEPRISZ: No, Your Honor. There is nothing
 2 - - - nothing that entitles a seventeen-year-old under the
 3 constitution to carry a weapon. And he's not - - - as I
 4 said, he's not challenging that here. And there has been -
 5 - - he didn't raise that below. And there has been no
 6 litigation on whether or not, as a seventeen-year-old who
 7 was, you know, almost eighteen - - - whether or not he
 8 should've had that right. So that's - - - that's not - - -
 9 that's not an issue.

10 But just one - - - one more point on
 11 preservation. There would've been sound reasons in this
 12 case for - - - to - - - to require the preservation. Well,
 13 for one thing - - - well, two - - - two reasons, and a
 14 practical reason. If - - - the efficiency of the process
 15 would have been enhanced in this case if he had preserved
 16 his claim in the trial court. This would've given - - -
 17 this was a negotiated plea involving two different
 18 indictments. Had he raised his constitutional challenge at
 19 that time - - - and - - - and they still wish to negotiate
 20 a plea - - - the - - - the ADA could have offered a plea
 21 that might not have been potentially subject to challenge
 22 on appeal. So just in terms of an interest in - - - in
 23 ensuring the efficiency of the litigation, if he had raised
 24 it, that would've gone out of it.

25 And - - - and the other reason is there are sound

1 reasons to support the requirement of preservation. In
 2 this particular case, he's asking - - - defendant is asking
 3 for - - - for systemic changes in - - - in the penal law
 4 and in CP - - - CPL. And it would be - - - he's asking for
 5 drastic, very drastic steps that this - - - this court
 6 should not be addressing in the first instance without
 7 litigation below, without opportunity for the parties to
 8 have raised these issues, aired all of their arguments, and
 9 for both the trial court to - - - to present a recent
 10 decision, as well as the Appellate Division - - - so that
 11 when it gets to this court, this court has a full record in
 12 order to consider this issue.

13 JUDGE RIVERA: Let - - - let me go with the
 14 argument that hasn't - - - is not making the argument about
 15 the lifetime ban. Let's say he was. Let's say he was.
 16 Can someone who is a minor challenge the lifetime ban? Or
 17 only someone who is imposed the ban able to challenge that
 18 if it - - - if they're an adult?

19 MS. CIEPRISZ: Well, our position is that he
 20 wouldn't have - - - he certainly doesn't have standing in
 21 this litigation, or an adult wouldn't have standing in this
 22 litigation, until he actually in the future applies for a
 23 license and - - - and is turned down. So that - - -

24 JUDGE RIVERA: Wouldn't that be obviously futile?
 25 Why - - - why would you apply when the court has ordered a

1 lifetime ban?

2 MS. CIEPRISZ: Well, there's been no lifetime ban
3 ordered - - -

4 JUDGE RIVERA: Okay.

5 MS. CIEPRISZ: - - - that he - - - he is not
6 banned - - - there's no outright ban saying that you - - -
7 he can't apply. He could apply and - - - and see if he - -
8 -

9 JUDGE RIVERA: And - - - and he might potentially
10 be granted a license? Is that what you're saying?

11 MS. CIEPRISZ: Well, I - - -

12 JUDGE RIVERA: There's no obstacle to granting a
13 license?

14 MS. CIEPRISZ: Well, he - - - his conviction
15 certainly is an obstacle.

16 JUDGE RIVERA: That's what I'm saying.

17 MS. CIEPRISZ: Yes.

18 JUDGE RIVERA: Why is that not futile?

19 MS. CIEPRISZ: I'm sorry? Why is that - - -

20 JUDGE RIVERA: Why would that not be futile, if
21 it - - - if the purpose of that is to file some papers but
22 you're never going to get granted the license because of a
23 ban?

24 MS. CIEPRISZ: Well, our - - - our position is -
25 - - it's not that it's not - - -

1 JUDGE RIVERA: You're an ineligible class.

2 MS. CIEPRISZ: Right. But - - - but he - - -
3 that's something that hasn't happened to him yet. He
4 hasn't suffered that harm yet. He hasn't faced that yet.
5 He's - - - he's - - - and that is not relevant to this
6 particular litigation.

7 Now, with respect to the merits, our position is
8 that this is not a Second Amendment issue, and this is not
9 an issue that was based upon Bruen. Defendant does not
10 assert a cognizable Second Amendment claim because the - -
11 - nothing in the plain text of the Second Amendment,
12 nothing in Bruen, limits penalties for unlawful conduct for
13 violations of the Second Amendment. And nothing in the
14 Second Amendment controls what conduct a state may
15 criminalize - - - well, the Second Amendment controls what
16 conduct the state may regulate and what the state may
17 criminalize. But it does not speak to what penalty the
18 state may impose once there's been a violation.

19 Now - - - so the defendant vastly over-reads
20 Bruen in arguing that the classifications of 265.03(3)
21 violate the Second Amendment. Nothing in that decision
22 casts any doubt on the laws that criminalize unlicensed
23 carry or the sentences that may be imposed.

24 These are legitimately policy-oriented issues
25 that - - - that the - - - the state may make depending upon

1 - - - there's nothing in the Constitution, nothing in the
2 Second Amendment in particular, that requires the state to
3 take into account the reason why the person who doesn't
4 have the license failed to get his license. Nor does Bruen
5 undermine the state's authority to treat unlicensed public
6 carry differently from unlicensed possession in the home.
7 Again, that's a - - -

8 JUDGE CANNATARO: Would that hold true post-Bruen
9 as well?

10 MS. CIEPRISZ: Yes. Because the - - - the - - -
11 the striking down of the proper cause requirement did not
12 mean that for sentencing purposes the - - - the states must
13 consider in-home carry and - - - and public carry
14 equivalent for all purposes. Nothing in Bruen said that
15 the - - - the court - - - the states may not take into
16 account the very legitimate concerns that might arise when
17 somebody has - - - takes - - - carries a gun outside,
18 potentially at risk of harming many people, as opposed to
19 when somebody has a gun in the home.

20 JUDGE CANNATARO: So the rationality in the
21 difference of penalty survives post-Bruen?

22 MS. CIEPRISZ: Yes. And noth - - - nothing in
23 Bruen undermines that authority.

24 With respect to the mitigating circumstances
25 argument, again, nothing in the Second Amendment requires

1 the legislature to treat someone who's under consideration
2 for youth offender treatments - - - whether or not their
3 conduct is protected by the Second Amendment or not.

4 But the facts in the record in this case do not
5 even support a self-defense claim, which I - - - which I
6 know has been touched - - - touched on. But there was - -
7 - under no circumstances was - - - is there support in the
8 record that this defendant used his gun in self-defense.
9 The facts of the matter are that when this argument
10 occurred, the defendant was in a car with another person,
11 and that the People whose house he was parked in front of
12 came out and were outside of the car, and that this verbal
13 argument ensued. There's no indication that anyone that
14 they were arguing with had - - - had a weapon.

15 But under this - - - under these circumstances,
16 the defendant took the time to pop the trunk, get out of
17 the car, and get a - - - a gun, which he brandished, and
18 activated the slide, chambering a bullet so that it was
19 ready to go. And nothing in the record suggests that he
20 had any reason to fear this situation and that he had any
21 reason to use that weapon as he did.

22 CHIEF JUDGE WILSON: Thank you.

23 MS. CIEPRISZ: Thank you.

24 MR. TALIA: I'd just like, briefly, to address a
25 couple issues, Your Honors.

1 First, on the merits. Our argument here is - - -
2 unlike the one in Hughes, is - - - is very concrete in
3 tying directly to the Second Amendment. And he was - - -
4 the connection was unclear. It was almost like the
5 proportionality argument or a chill on Second Amendment
6 rights. Here, the arg - - - the argument is based upon the
7 foundational holdings in Bruen, as I said, extending Second
8 Amendment protections to outside-the-home carry with
9 limited restrictions. By classifying all unlicensed
10 possession as a C felony, and then resulting in that
11 lifetime ban, as - - - as they admitted, that he can't - -
12 - he can't get a license because he's now a violent felon
13 under New York law - - - is an impermissible restriction,
14 it's not contemplated by Bruen, it wouldn't be condoned by
15 Bruen.

16 JUDGE GARCIA: I'm sorry, how does that - - - I'm
17 just maybe not understanding this - - - how does this
18 apply, what your argument is here, to the YO determination?
19 Because you could go apply for a license later with this
20 felony and say, this is unconstitutional. You're denying
21 me a license because, you know, of Bruen. And you can
22 litigate that if they deny you a license based on this
23 particular conviction. But how does, then, this overlay
24 the YO determination?

25 MR. TALIA: Because - - -

1 JUDGE GARCIA: Seems like what you're arguing is
2 secondary effects of your conviction.

3 MR. TALIA: It's not secondary effects because
4 his conviction - - - the fact that he was convicted of a
5 violent C felony makes him presumptively ineligible for YO
6 consideration. And because that classification we're
7 arguing is unconstitutional, he wouldn't be presumpt - - -
8 he should go back and not be presumptively ineligible
9 anymore. So the highest-level crime that - - - that he
10 should've been guilty of was the A misdemeanor for either
11 noncompliance or in - - - in-home possession.

12 JUDGE GARCIA: Isn't another way to look at that
13 that after Bruen he may no longer be presumptively
14 ineligible? So you can litigate that?

15 MR. TALIA: He - - - he can - - - he can litigate
16 the issue later on in terms of, you know, whether he may be
17 qualified to get a license. He can argue it there. It
18 might be a little bit too late at that point. I think that
19 the time now is in sentencing. But - - - but he served - -
20 - but he got a ten-year sentence, where he may have - - -
21 where he could've gone for YO consideration if he had not
22 been presumptively ineligible. And he could - - - the
23 maximum he could've gotten is four - - - is a four-year
24 sentence if he - - - if he qualifies.

25 Now, we're not - - - I'm not arg - - - that - - -

1 that would be a later determination to be made. But if he
2 - - - the violent felony made him presumptively ineligible,
3 he should not have been - - - the classification of that in
4 all circumstances is unconstitutional. It should've - - -
5 we - - - we tie it to noncompliance, an A misdemeanor, or
6 in-home possession, an A misdemeanor. He would've - - - he
7 would've gone right to the second stage and consideration
8 of a YO adjudication. And if he got YO adjudication, he -
9 - - his sentence would have been drastically different than
10 what he received.

11 CHIEF JUDGE WILSON: Thank you, Counsel.

12 MR. TALIA: Thank you, Your Honors.

13 (Court is adjourned)

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C E R T I F I C A T I O N

I, Terry Hodges, certify that the foregoing transcript of proceedings in the Court of Appeals of People of the State of New York v. Jose M. Rivera, No. 64 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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